



1998

When Employers Litigate to Arbitrate: New Standards of Enforcement for Employer Mandated Arbitration Agreements

Amy L. Ray

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

Amy L. Ray, *When Employers Litigate to Arbitrate: New Standards of Enforcement for Employer Mandated Arbitration Agreements*, 51 SMU L. Rev. 441 (1998)
<https://scholar.smu.edu/smulr/vol51/iss2/6>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

WHEN EMPLOYERS LITIGATE TO ARBITRATE: NEW STANDARDS OF ENFORCEMENT FOR EMPLOYER MANDATED ARBITRATION AGREEMENTS

*Amy L. Ray**

TABLE OF CONTENTS

I. INTRODUCTION	441
II. HISTORY OF EMPLOYMENT ARBITRATION	444
III. METHODS OF IMPLEMENTING MANDATORY ARBITRATION AGREEMENTS WITH CURRENT EMPLOYEES	447
A. MODIFYING THE EMPLOYEE HANDBOOK	448
B. COMPELLING EMPLOYEES TO SIGN MANDATORY ARBITRATION AGREEMENTS	455
C. PROVIDING INCENTIVE FOR EMPLOYEES TO SIGN MANDATORY ARBITRATION AGREEMENTS	457
IV. GOVERNMENT REACTION	459
A. PROPOSED LEGISLATIVE REFORM	459
B. AGENCY RESPONSE	462
V. POLICY ARGUMENTS BEHIND THE ENFORCEMENT/NON-ENFORCEMENT OF MANDATORY ARBITRATION AGREEMENTS BETWEEN EMPLOYERS AND EMPLOYEES	465
A. PRO-ENFORCEMENT ARGUMENTS	465
B. ANTI-ENFORCEMENT ARGUMENTS	465
VI. CONCLUSION	466

I. INTRODUCTION

DISPUTES between employers and employees are nothing new, but in recent years the number of employee-initiated lawsuits has increased dramatically. Since 1969, the number of employment discrimination claims filed in federal court has increased over two

* The author wishes to thank visiting Professor Richard A. Bales for his ideas and assistance with this Comment.

thousand percent.¹ The rising cost of defending this litigation has led many employers to consider methods of alternative dispute resolution, including negotiation, arbitration, or mediation.

Arbitration has proved to be a popular method for employers to resolve disputes with employees for several reasons. Employers prefer to keep such disputes away from juries who may be sympathetic to employees with whom the jury members can relate.² Arbitration is generally quicker and less expensive than traditional litigation, although the increase in the number of arbitrated cases is beginning to diminish this beneficial aspect of arbitration.³ In addition, arbitration can be a more private method of dispute resolution resulting in less negative publicity for the employer.⁴ Another benefit of the privacy associated with arbitration is the reduced likelihood that other employees' morale will be affected by the dispute.⁵ Finally, as distinguished from judges who may not have the time to educate themselves on the most current changes in employment law, organizations such as the American Arbitration Association can provide arbitrators that specialize in employment disputes.⁶

Arbitration, however, does have its negatives. Generally, there is no meaningful appeals process from an arbitration proceeding.⁷ Discovery is sometimes limited, which generally harms the employee more than the employer, but can limit the employer's basis for encouraging settlement through its greater resources to expound labor-intensive discovery requests on the employee's lawyer.⁸ Employers may also forego some accepted defenses and waive the employee's strict burden of proof that federal judges would enforce, but arbitrators may not be bound to follow.⁹ Finally, the ease and finality of arbitration might encourage a plaintiff's lawyer to take a case that he would not otherwise take, thus giving more employees incentive to bring employment claims.¹⁰ In some cases, the relative informality of arbitration may encourage employees to pursue their claims pro se.¹¹

1. See Joseph I. Goldstein & Martin F. Payson, *Alternate Dispute Resolution of Employment Matters in the Public Sector*, SPECTRUM: J. ST. GOV'T, Sept. 1, 1995, at 36.

2. See Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 593 (1995).

3. See *id.*

4. See *id.*; Robert J. Lewton, Comment, *Are Mandatory Binding Arbitration Requirements a Viable Solution for Employers Seeking to Avoid Litigating Statutory Employment Discrimination*, 59 ALB. L. REV. 991 (1996).

5. See Lewton, *supra* note 4 at 993; American Arbitration Association, *Resolving Employment Disputes: A Manual on Drafting Procedures*, 1993 WL 495884, at *1 (1993).

6. See AMERICAN ARBITRATION ASSOCIATION, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES; ARBITRATION AND MEDIATION RULES 6 (1996).

7. See William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 DRAKE L. REV. 255, 287 (1994).

8. See *id.*

9. See *id.* at 288.

10. See *id.* at 288-89.

11. See RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* (forthcoming) (manuscript at 159, on file with *SMU Law Review*).

Despite any negative aspects of arbitration, more and more employers are implementing arbitration agreements with their employees. A recent study performed by the United States General Accounting Office found that while only 1.3% of employers use arbitration agreements outside of the collective bargaining context, 8.4% were considering instituting such agreements.¹² This percentage may already be out-of-date when considering the American Arbitration Association's estimate that employment arbitration claims increased seventy percent between 1994 and 1995.¹³

One problem facing employers who wish to utilize an arbitration policy for employment disputes is how to implement such a policy. Employers may include provisions in employment applications, employment contracts, employee handbooks, or even adopt a stand-alone arbitration policy statement. Although almost every method of implementation has been contested at one time or another, agreements to arbitrate between employers and new or prospective employees have generally been easier to enforce.¹⁴ The problem facing most employers has been how to institute such an arbitration agreement with current employees who did not sign arbitration agreements at the time their employment commenced. This Comment will focus on methods of implementing agreements mandating arbitration between employers and their existing employees, trends in the enforcement of such agreements, public and government reaction to the enforcement of mandatory employment arbitration agreements, and the policy reasons for the enforcement or non-enforcement of these agreements.¹⁵

12. See Lewton, *supra* note 4, at 991 n.3.

13. See Diane E. Lewis, *Mandatory-Arbitration Controversy Grows; Some Must Waive Right to a Trial on Work Issues*, COURIER-J. (Louisville, Ky.), Sept. 30, 1996, at 4D.

14. See, e.g., *Degaetano v. Smith Barney, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 401 (S.D.N.Y. 1996) (arbitration agreement was enforced where plaintiff signed a "Principles of Employment" agreement at the time of hiring in which she agreed to observe the company's arbitration procedure); *Golenia v. Bob Baker Toyota*, 915 F. Supp. 201 (S.D. Cal. 1996) (employee was bound by arbitration agreement he signed during the application process).

15. The focus of this Comment will be on arbitration agreements between individual employees and their employers. The topic of arbitration in the context of collective bargaining agreements is a topic unto itself, and many articles have addressed the topic more fully. See, e.g., Don A. Banta et al., *Labor Arbitration and the Law of Collective Bargaining Agreements*, 7 LAB. LAW. 747 (1991); Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571 (1990); Stephen W. Skrainka, *The Utility of Arbitration Agreements in Employment Manuals and Collective Bargaining Agreements for Resolving Civil Rights, Age, and ADA Claims*, 37 ST. LOUIS U. L.J. 985 (1993). In addition, the securities industry has a long history of requiring employees to sign arbitration agreements as part of their registration with national securities exchanges such as the New York Stock Exchange. Arbitration agreements signed by employees in the securities industry involve issues that are wholly distinct from this discussion. For a more complete treatment of arbitration agreements in the securities industry, see, for example, Mahlon M. Frankhauser, *Arbitration: The Alternative to Securities and Employment Litigation*, 50 BUS. LAW. 1333 (1995); Margaret M. Harding, *The Cause and Effect of the Eligibility Rule in Securities Arbitration: The Further Aggravation of Unequal Bargaining Power*, 46 DEPAUL L. REV. 109 (1996); Megan L. Dunphy, Comment, *Mandatory Arbitration: Stripping Securities Industry Employees of Their Civil Rights*, 44 CATH. U. L. REV. 1169 (1995). Note, however, that the National Association of Securities Dealers, Inc. voted on August 7, 1997, to eliminate mandatory arbitration of employment

II. HISTORY OF EMPLOYMENT ARBITRATION

Traditionally, many courts were hesitant to enforce even those arbitration agreements that were entered into voluntarily after arms-length bargaining.¹⁶ In response to this hesitance, Congress passed the Federal Arbitration Act (FAA), signed into law by President Calvin Coolidge in 1925, with the purpose of putting arbitration agreements "upon the same footing as other contracts."¹⁷ The Act provides:

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹⁸

Section 1 of the Act, however, provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."¹⁹

The proper application of the section 1 exclusion has been one of the most hotly debated issues arising under the Act. Courts have differed in interpretation of the section, with the majority concluding that the exclusion should be "limited to workers employed in the transportation industries or engaged in the actual movement of goods in interstate commerce."²⁰ A minority of courts has concluded, based upon the broader definition of interstate commerce, that the exclusion was meant to apply to all employment contracts.²¹ Only the Ninth Circuit has not yet ruled on the issue, but at least one district court within the circuit has

discrimination claims. See *Arbitration: Elimination of Mandatory Arbitration of Discrimination Claims Proposed by NASD*, 153 Daily Lab. Rep. (BNA) 1 (Aug. 8, 1997).

16. See, e.g., *Insurance Co. v. Morse*, 87 U.S. 445 (1874): "[A man] may submit his particular suit by his own consent to an arbitration . . . He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented." *Id.* at 451 (Hunt, J., dictum).

17. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994).

18. *Id.* § 2.

19. *Id.* § 1.

20. *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 n.2 (5th Cir. 1996); see also *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 596-602 (6th Cir. 1995); *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., Local 437*, 207 F.2d 450, 453 (3d Cir. 1953).

21. See, e.g., *United Elec. Radio & Mach. Workers of Am. v. Miller Metal Prods.*, 215 F.2d 221 (4th Cir. 1954). Some commentators have divided courts into four approaches on the issue. See, e.g., Christopher A. Barreca & Eric T. Levine, *Developments in Arbitration of Employment Claims/Cases*, in THE SOUTHWESTERN LEGAL FOUNDATION 43D ANNUAL INSTITUTE ON LABOR AND EMPLOYMENT LAW 2-3 (1996) (dividing the approaches into the following categories: (1) exemption applies to all employment contracts; (2) exemption applies to those employed in the transportation industry; (3) exemption applies to those directly engaged in the movement of goods in interstate commerce; and (4) exemption applies to collective bargaining agreements).

sided with the majority's more narrow exclusion.²² The Supreme Court has not directly addressed the issue, but some courts and commentators have interpreted its holding in *Gilmer v. Interstate/Johnson Lane Corp.* as suggesting that section 1 should be interpreted narrowly to include only transportation workers.²³

The plaintiff in *Gilmer* was hired by the defendants as their manager of financial services, and was required to register with the New York Stock Exchange. His application for registration with the Exchange included an arbitration agreement. When Gilmer was terminated at the age of sixty-two, he filed an age discrimination claim with the Equal Employment Opportunity Commission, and then brought suit in federal court. The Court enforced the arbitration agreement, but refused to address the issue of whether section 1 of the FAA applied to all contracts of employment, holding instead that the agreement was part of the registration process, and not in Gilmer's employment contract.²⁴ The Court did hold that statutory claims could be arbitrated, and that doing so did not force the parties to forego any substantive rights provided by the statute.²⁵ Subsequent courts, however, have interpreted *Gilmer's* failure to address the issue of whether the FAA applies to all employment contracts, or only to those of employees who are engaged in the transportation industry or otherwise in the movement of goods in interstate commerce, as permission to continue adopting the more narrow interpretation of section 1.²⁶

The arguments for a more limited interpretation of section 1 of the Federal Arbitration Act often stem from the legislative history of the Act. Its legislative history shows that certain groups in the transportation industry, namely the Seamen's Union, lobbied to have the industry removed from the Act's coverage. The Third Circuit was the first to analyze section 1 in *Tenney Engineering v. United Electric Radio & Machine Workers of America, Local 437*, which looked to a report from the American Bar Association's Committee on Commerce, Trade and Commercial Law to find that the drafters wanted to exclude the contracts of seamen from the Act because the Seamen's Union opposed the Act on the grounds that their wages were already subject to federal admiralty jurisdiction.²⁷ Other transportation industry workers, such as railroad employees, also had special procedures for dispute resolution already in

22. See *Golenia*, 915 F. Supp at 203; see also *Brown v. KFC Nat'l Management Co.*, 921 P.2d 146, 156-57 (Haw. 1996) for an interesting discussion of the split between the circuits in the interpretation of the Federal Arbitration Act's section 1 employment exclusion.

23. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). See also BALES, *supra* note 2, Howard, *supra* note 7, and Lewton, *supra* note 4, for a discussion of the impact of *Gilmer* on the enforcement of employment arbitration agreements.

24. See *Gilmer*, 500 U.S. at 25 n.2.

25. See *id.* at 26.

26. See *Rojas*, 87 F.3d at 747-48; *Topf v. Warnaco, Inc.*, 942 F. Supp. 762, 765 (D. Conn. 1996); *Maye v. Smith Barney, Inc.*, 897 F. Supp. 100, 105 (S.D.N.Y. 1995).

27. See *Brown*, 921 P.2d at 156 (citing *Tenney Eng'g v. United Elec. Radio & Mach. Workers of Am., Local 437*, 207 F.2d 450, 452 (3d Cir. 1953)).

place, according to *Tenney*, so it made sense to exclude these workers from coverage under the Act.²⁸ From this interpretation, the court determined that the intent of the phrase "any other class of workers engaged in foreign or interstate commerce" was intended to include only those similarly engaged in the transportation industry under the rule of *ejusdem generis*.²⁹ Courts have also rationalized that "[if] Congress had intended to exclude all contracts of employment from FAA coverage, Congress could simply have used statutory language in § 1 similar to the following: '... but nothing herein contained shall apply to any contracts of employment.'"³⁰ Another rationale for limiting the FAA exclusion is the often-stated rule that any doubts over arbitrable issues should be resolved in favor of arbitration.³¹

Opponents of this narrow reading of the exclusion argue that courts should not apply *ejusdem generis* or resort to legislative history to interpret a statute whose language is not ambiguous.³² They argue that the phrase "any other class of workers engaged in foreign or interstate commerce" is clear and susceptible to only one interpretation. As one court put it, "[t]he purpose of [*ejusdem generis*'s] use is to carry out, not defeat, the legislative intent."³³ Another argument against a limited interpretation of section 1 is that courts have confused favoritism for arbitration with a narrow interpretation of section 1. According to one court, "Congress enacted the FAA as the articulation of the federal policy for favoring arbitration. It is redundant and inappropriate to use the very policy [promoted by the Federal Arbitration Act] to assist in the interpretation of its own codification."³⁴ Finally, the same court, despite its criticism of looking to the legislative history of the Act, found congressional intent to exclude all contracts of employment from the history of the Act.

A review of the legislative history of the FAA confirms that the FAA was never meant to incorporate employment contracts with the requisite effects on interstate commerce within its scope. The Act was originally drafted by a committee of the American Bar Association to overturn a common-law rule which precluded enforcement of agreements to arbitrate in commercial contracts At a hearing of

28. *See id.*

29. *See id.* at 156 n.13 ("Pursuant to the rule of *ejusdem generis*, which is an 'established rule of statutory construction, where words of general description follow the enumeration of certain things, those words are restricted in their meaning to objects of like kind and character with those specified' (citations omitted).") It follows from this that if the language "seamen, and railroad employees" is followed by general language about other employees, it should be interpreted to mean employees of a like kind, which would be those employees in the transportation industry.

30. *Rojas*, 87 F.3d at 748.

31. *See id.* at 749.

32. *See, e.g., Arce v. Cotton Club of Greenville, Inc.*, 883 F. Supp. 117, 121 (N.D. Miss. 1995) (arguing for the exclusion of all contracts of employment from coverage under the FAA). *Arce*'s precedential value may be limited after the Fifth Circuit's decision in *Rojas v. TK Communications*, but the court's opinion encompasses many of the arguments used by opponents of a narrow interpretation of FAA section 1.

33. *Arce*, 883 F. Supp. at 121 (citations omitted).

34. *Id.* at 119 n.2.

the Senate Judiciary Committee, the chairman of the ABA committee responsible for drafting the bill stated that the bill "is not intended [to] be an act referring [to] labor disputes, at all. It is purely an act to give the merchants the right or privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it."³⁵

Despite the controversy over the section 1 exclusion, courts have generally enforced employment agreements that mandate the arbitration of federal statutory claims, including those arising under the Employee Retirement Income Security Act,³⁶ the Americans with Disabilities Act,³⁷ the Civil Rights Act of 1964,³⁸ the Federal Railroad Safety Act,³⁹ and the Equal Pay Act,⁴⁰ as well as a variety of state statutory claims under the Federal Arbitration Act.⁴¹

III. METHODS OF IMPLEMENTING MANDATORY ARBITRATION AGREEMENTS WITH CURRENT EMPLOYEES

In determining whether to enforce arbitration, a court will generally engage in a four-step inquiry:

[f]irst, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended for those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then determine whether to stay the balance of the proceedings pending arbitration.⁴²

For purposes of the arbitration implementation process, the first step will be crucial in order to overcome potential challenges to a mandatory arbitration policy. When arbitration is made mandatory in the workplace, many employees may later argue that they did not agree to arbitration or were coerced into agreeing to the policy in order to keep their jobs. Further, whether contractual consideration for the agreement exists will often be at issue. The method of implementation may be determinative in whether such challenges will be successful.

35. *Id.* at 122 (citing *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 311 (6th Cir. 1991) (quoting *Hearings on S. 4213 and S. 4214 Before the Subcomm. on the Judiciary*, 67th Cong. 9 (1923))).

36. Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1994).

37. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994).

38. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6 (1994).

39. Federal Railroad Safety Act of 1970, Pub. L. 91-458, 84 Stat. 971 (1970) (repealed).

40. Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56 (1963).

41. See *Barreca & Levine*, *supra* note 21, at 9-13. See generally *BALES*, *supra* note 11, for a discussion of state and federal statutory claims for which courts have compelled arbitration.

42. *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 844 (2d Cir. 1987) (citations omitted); *Hinson v. Jusco Co. Ltd.*, 868 F. Supp. 145, 148 (D.S.C. 1994).

A. MODIFYING THE EMPLOYEE HANDBOOK

The Federal Arbitration Act requires that agreements to arbitrate be in writing, but it does not require that they be signed by the parties.⁴³ Courts will follow ordinary contract principles to determine if arbitration agreements should be enforced.⁴⁴ For example, courts might not imply constructive consent to enforce an arbitration agreement in the absence of a party's actual intention. Such actual intention may either be express (such as a written or oral statement) or implied from the party's conduct.⁴⁵ Since consent can be implied, employers often create a written arbitration policy that they impose unilaterally on employees in an attempt to mandate arbitration of all workplace disputes without implementing individual arbitration agreements with every employee. An example of such a written policy would be an amendment to an employee handbook or manual.

Modification of employee handbooks or manuals to include arbitration agreements has sometimes bound employees to arbitrate claims against employers, despite the fact that employees may not have signed an explicit agreement to arbitrate. As with other arbitration agreements, employees must presumably know about the arbitration clause in order to be bound by it.⁴⁶ Under several recent challenges, the trend has been toward the enforcement of arbitration clauses in employee handbook amendments.

In *Carlson v. Hutzel Corp.*,⁴⁷ the court enforced an arbitration provision contained in a written supplement that amended the employee manual. The plaintiffs were non-union nursing administrators at the defendant's hospital who brought constructive discharge claims against the defendant. The defendant had unilaterally changed a written policy statement during the plaintiffs' employment to mandate binding arbitration, but did not seek the consent of the employees. The defendant chal-

43. See 9 U.S.C. §§ 2, 3 (1994); *Genesco*, 815 F.2d at 840; *A/S Custodia v. Lessin Int'l, Inc.*, 503 F.2d 318, 320 (2d Cir. 1974); *Ocean Indus., Inc. v. Soros Assoc. Int'l, Inc.*, 328 F. Supp. 944, 947 (S.D.N.Y. 1971); but see *Nicholas A. Califano, M.D., Inc. v. Shearson Lehman Bros., Inc.*, 690 F. Supp. 1354, 1356 (S.D.N.Y. 1988) (stating that "enforcement of unsigned arbitration agreements is the exception, not the rule").

44. See *A/S Custodia*, 503 F.2d at 320; *Western Int'l Media Corp. v. Johnson*, 754 F. Supp. 871, 873 (S.D. Fla. 1991) (looking to course of conduct to find arbitration agreement enforceable); *Diskin v. J.P. Stephens & Co., Inc.*, 652 F. Supp. 553, 556 (D. Mass. 1987) (using the "merchant exception" of the New York Uniform Commercial Code § 2-104 to enforce an unsigned arbitration agreement); but see *Carlson v. Hutzel Corp.*, 455 N.W.2d 335, 338 (Mich. Ct. App. 1990) (enforcing an arbitration agreement without using general contractual principles); see also *infra* text accompanying notes 47-51 for a discussion of *Carlson*.

45. See *Shaffer v. Stratton Oakmont, Inc.*, 756 F. Supp. 365, 369 (N.D. Ill. 1991).

46. See *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), cert. denied, 116 S. Ct. 61 (1995) (holding there must be "at least a knowing agreement to arbitrate" before employees give up any procedural rights). For a more complete discussion of *Prudential*, see *Recent Cases: Arbitration—Statutory Claims—Ninth Circuit Imposes Knowing Waiver Standard for Mandatory Arbitration of Sexual Harassment Claims—Prudential Insurance Co. v. Lai*, 109 HARV. L. REV. 1439 (1996).

47. 455 N.W.2d 335 (Mich. Ct. App. 1990).

lenged the plaintiffs' wrongful discharge claim on the grounds that they were required to arbitrate any employment disputes, but the plaintiffs argued that the unilateral arbitration policy should not be enforced. Under the court's analysis in *Carlson*, mutual assent to the term of employment was not required.⁴⁸ The court held that a unilateral change to a written policy statement was enforceable in contract, even though the right to such enforcement did not arise under general contract principles.⁴⁹ Because the contract rights did not arise out of general contract principles, the court found that the strict application of contractual modification rules was not necessarily appropriate.⁵⁰ Thus, according to the court, no preliminary negotiations or meeting of the minds were required because once the employer makes the personnel procedures known to employees, "the employment relationship is presumably enhanced."⁵¹

When the tables are turned, however, and it is the employee who is seeking to bind the employer to an arbitration agreement found in an employment handbook, the courts have not always been as willing to compel arbitration. For example, in *Reilly v. Stroehmann Bros.*,⁵² the plaintiff was a salesman who was discharged by the defendant for alleged misconduct. He requested binding arbitration to review his termination, stating that the employee handbook provided for binding arbitration. The relevant provision of the handbook read:

Stroehmann's management feels strongly about maintaining fairness in its hiring and disciplinary practices. That is why we have designed a free and completely neutral third party arbitration procedure for all non-union employees. Under this program, if you are discharged for any reason, you may have an Arbitrator appointed by the AMERICAN ARBITRATION ASSOCIATION to hear and decide whether you have been discharged properly. The decision of the Arbitrator appointed to hear the case will be FINAL and BINDING on both sides⁵³

The court refused to compel the employer to arbitrate, however, finding that the handbook provision was simply a description of a program rather than a mandatory arbitration policy. According to the court,

A description of an arbitration program for discharged non-union employees must not be construed as a rule or regulation anymore than the life insurance benefits or other benefits described in the handbook. The arbitration provision does not require that employees submit discharges to binding arbitration, instead, non-union employees "may" submit to arbitration if they so choose.⁵⁴

Unlike *Carlson*, most courts that have found arbitration provisions contained in employee handbook amendments to be enforceable have

48. *See id.* at 339.

49. *See id.* at 338.

50. *See id.*

51. *Id.*

52. 532 A.2d 1212 (Pa. Super. Ct. 1987).

53. *Id.* at 1214.

54. *Id.* at 1215.

done so under general contract principles, finding some form of acceptance on the part of the employee. In *Lang v. Burlington Northern Railroad Co.*,⁵⁵ for example, the plaintiff had been an employee of Burlington Northern since 1965. In 1991, Burlington Northern adopted a policy requiring arbitration of all claims relating to termination of employment that could not be resolved internally.⁵⁶ Employees were informed of the new policy via a letter that explained the policy and included three modified pages to be inserted in the employee handbook.⁵⁷ The policy provided in part that: "All claims, disputes, or issues, related to or arising out of the termination of employment or exempt status of an employee of the company shall be submitted for resolution exclusively by arbitration and only after all internal resolution efforts have been exhausted."⁵⁸ The court enforced the arbitration clause, stating that clear and definite policy language in employee manuals may constitute a binding unilateral contract under Minnesota law.⁵⁹ The court found that arbitration was a term of employment that was presented as an offer to the employee and was accepted with sufficient consideration by the fact that the employee remained on the job, although he was free to leave.⁶⁰

In *Kinnebrew v. Gulf Insurance Co.*,⁶¹ a case similar to *Lang*, employees received a copy of Gulf Insurance's new mandatory arbitration policy with an explanatory memorandum in the mail, and Gulf outlined the policy in the company's employee handbook.⁶² The handbook read:

If the internal dispute resolution procedure does not resolve the concern, the dispute may be submitted to binding arbitration in accordance with [Gulf Insurance's] employment arbitration policy. Arbitration is an essential element of your employment relationship and is a condition of your employment. This policy makes arbitration required, and exclusive, for the resolution of all employment disputes which may arise⁶³

The plaintiff in *Kinnebrew* had not been terminated, but instead brought claims against her employer under the Texas Commission on Human Rights Act and the Equal Pay Act for allegedly paying her less than the male who had previously held her position. The court relied on *Lang* in finding that an arbitration agreement instituted during an employee's period of employment was enforceable if the employee continued to work for the employer after the policy was instituted.⁶⁴ Unlike Minnesota, however, Texas courts have generally held that employee handbooks are

55. 835 F. Supp. 1104 (D. Minn. 1993).

56. *See id.* at 1105.

57. *See id.*

58. *Id.*

59. *See id.* at 1106 (citing *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 626-27 (Minn. 1983)).

60. *See Lang*, 835 F. Supp. at 1106.

61. 67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. Nov. 28, 1994).

62. *See id.* at 190.

63. *Id.* at 189.

64. *See id.* at 191.

not binding employment contracts in the absence of language to the contrary, although a few have held that employees may unilaterally be bound by new terms of employment.⁶⁵ The court failed to address the issue of whether employee manuals are binding on employees in Texas or to address any distinctions at all between Texas and Minnesota law, but simply used *Lang* for the proposition that "federal courts do not hesitate to find an enforceable agreement to arbitrate when an arbitration policy is instituted during an employee's employment and the employee continues to work for the employer thereafter."⁶⁶

As one commentator has suggested, "[t]he *Kinnebrew* decision is remarkable for its implications. If courts follow *Kinnebrew*, employers in Texas will be free to unilaterally insert an arbitration agreement in an employee manual, significantly limit available statutory remedies, and prevail in the face of an employee judicial challenge."⁶⁷

In another handbook modification case, *Nghiem v. NEC Electronic, Inc.*,⁶⁸ the employee signed an employment contract with NEC in 1989, which did not provide for arbitration and that contained a clause stating that:

[N]o terms or provisions of this Agreement shall be varied or modified by any prior or subsequent act of either me or the Company except that the Company and I may subsequently amend this agreement by written instruments that specifically refer to this agreement and that are executed in the same manner as this agreement.⁶⁹

Nghiem refused to sign a modified version of the employment contract because it contained an arbitration provision, but did sign an acknowledgment of his receipt of a new employee handbook that described a four-step dispute resolution process that required arbitration as the fourth and final step.⁷⁰ Despite his refusal to sign the employment contract, Nghiem apparently thought he had no alternative but to arbitrate and wrote a letter to NEC's director of human resources requesting arbitration. Subsequently, he proceeded with the arbitration, although he said he thought it was non-binding. Holding that "while the FAA 'requires a writing, it does not require that the writing be signed by the parties,'" the court found that the employee handbook, the signed acknowledgment, and Nghiem's letter to the human resources director constituted writings memorializing an agreement to arbitrate.⁷¹ The court suggested, though,

65. See *Hicks v. Baylor Univ. Med. Ctr.*, 789 S.W.2d 299, 302 (Tex. App.—Dallas 1990, writ denied) (holding that an employee handbook is not a binding contract of employment that would overcome the presumption of employment-at-will); see *infra* text accompanying notes 74-77 for a discussion of modifications to terms of employment that are binding on employees.

66. *Kinnebrew*, 67 Fair Empl. Prac. Cas. (BNA) at 191.

67. Pierre Levy, Comment, *Gilmer Revisited: The Judicial Erosion of Employee Statutory Rights*, 26 N.M. L. REV. 455, 466 (1996).

68. 25 F.3d 1437 (9th Cir. 1994).

69. *Id.* at 1439.

70. See *id.*

71. *Id.* at 1439-40.

that even if the writings were insufficient, Nghiem's conduct in pursuing arbitration implied an agreement to arbitrate.⁷²

Most courts will not find an agreement to arbitrate based solely on the fact that an employee signed an acknowledgment of receipt of an employee handbook, because the form will usually manifest receipt rather than assent.⁷³ The majority of courts, instead, will find the requisite mutual assent from conduct implying such assent rather than an express agreement.

Although it is arguably easier to find an implied agreement to arbitrate in conduct that appears to imply a willingness to arbitrate such as that in *Nghiem*, finding consent in the fact that an employee continues his employment after an arbitration policy is implemented is more problematic. Commentators have analogized cases like *Lang* and *Kinnebrew* to cases in which employees are bound to new terms of employment such as changes in pay structure, benefits, or security measures, or by remaining on the job after being informed of the new terms.⁷⁴ This comparison ignores a small but significant distinction between an arbitration policy and other terms of employment. In an employment-at-will relationship, an employer may unilaterally modify the terms of employment, giving the employee two alternatives: resign, or remain employed under the new terms of employment.⁷⁵ If the employee remains employed and does not abide by the terms, he may presumably be terminated. The difference in the case of arbitration is that in many instances, at the time the parties are quarreling over the arbitration agreement, the employee has already been terminated for reasons unrelated to the arbitration policy. This may be different than a dispute over any other term of employment, such as salary, where the employee is likely still working for the employer at the time the dispute ensues. If the presumption in most states is that an employee handbook is not a binding contract in an employment-at-will rela-

72. See *id.* at 1440. Nghiem completed the arbitration process as set forth in the handbook, but claimed he did not intend for it to be binding and wrote to the American Arbitration Association asking for a trial de novo and confirming that the arbitration was not binding on him.

73. See Barreca & Levine, *supra* note 21, at 47; but see *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997) (holding that an acknowledgment form was actually a separate enforceable contract distinct from other provisions of the handbook based on the fact that it was on a separate page and contained language different from the rest of the handbook, such as the terms "I understand" and "I agree").

74. See Bales, *supra* note 2, at 616; see also *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228-29 (Tex. 1986) (noting that generally, when an employee receives unequivocal notice of a change in the terms of her employment and continues to work, she has accepted the modification); *Gamble v. Gregg County*, 932 S.W.2d 253, 255-56 (Tex. App.—Texarkana 1996, no writ) (employee could not collect benefits provided under old personnel manual because employee had knowledge of the changes in benefits and continued to work); *Jennings v. Minco Tech. Labs, Inc.*, 765 S.W.2d 497, 499-502 (Tex. App.—Austin 1989, writ denied) (employee was bound by new drug testing policy by continuing to work after implementation of the policy despite the fact that she argued she should have more choices than quitting or assenting); but see *Robinson v. Ada S. McKinley Community Servs., Inc.*, 19 F.3d 359, 364 (7th Cir. 1994) (employee was not bound by changes to employee manual because no new consideration).

75. See *Hathaway*, 711 S.W.2d at 229.

tionship without language to the contrary,⁷⁶ then an employer's only recourse against an employee who continues to work after an employment policy has been implemented and refuses to abide by the term of employment is to terminate the employee. The employer does not generally have any post-termination recourse against the employee in such an instance, and the result should be no different in the case of arbitration policies. If the employee has already been terminated, then the employer should not have another recourse. In many cases, however, courts are granting employers the post-termination recourse of mandatory arbitration, forcing the employee to give up procedural rights to a trial by jury. Employees are thus forced to give up rights after their employment has terminated without receiving anything in return for giving up that right. If arbitration clauses in handbooks are enforced in such cases, then employers are authorized to claim the handbooks are binding contracts only when it benefits them.⁷⁷

Arbitration clauses in modified employee handbooks are more closely analogized to the case of covenants-not-to-compete executed after the commencement of employment. Covenants-not-to-compete, if binding, are specifically intended to be applicable to the employee after the termination of employment. Similarly, most arbitration agreements are intended to be binding, if at all, after employment has been terminated.⁷⁸ Both types of agreements restrict the employee's actions beyond the duration of his employment, and both provide the employer with post-termination recourse against the employee.

Although states vary in their requirements for the enforcement of non-compete covenants, many will not enforce covenants entered into after the commencement of employment, at least in the absence of independent and adequate consideration.⁷⁹ Some courts have professed to be

76. See *Yowell v. Combs*, 89 F.3d 542, 544 (8th Cir. 1996) (citing *Cole v. Conservation Comm'n*, 884 S.W.2d 18, 20-21 (Mo. Ct. App. 1994)); *St. Peters v. Shell Oil Co.*, 77 F.3d 184, 187 (7th Cir. 1996); *Hicks v. Baylor Univ. Med. Ctr.*, 789 S.W.2d 299, 301 (Tex. App.—Dallas 1990, writ denied).

77. See *supra* text accompanying notes 52-54 for a discussion of *Reilly v. Stroehmann Bros.*, a case in which employees could not enforce an employee handbook as if it were a contract when it would benefit them rather than the employer.

78. Admittedly, this analysis ignores employment disputes between employers and employees when the employment relationship is still intact, but as many employment disputes occur after the employee is terminated, this analysis should encompass the majority of challenged arbitration agreements. Realistically, the analysis would not change dramatically for an arbitration dispute between an employer and an employee who had not been terminated, because at the time of the handbook amendment or other method of arbitration implementation, the employer would not have been able to anticipate when a dispute might arise and would have intended the arbitration provision to bind the employee both during and after employment.

79. See *Creative Entertainment, Inc. v. Lorenz*, 638 N.E.2d 217, 219 (Ill. App. Ct. 1994) (covenant-not-to-compete entered into after commencement of employment must be ancillary to employment contract, subordinate to contract's main purpose, and supported by adequate consideration); *Ruffing v. 84 Lumber Co.*, 600 A.2d 545, 548 (Pa. Super. Ct. 1991) (covenant-not-to-compete executed after the commencement of employment was not enforceable unless the employee receives a benefit or change in status); *but see Van Dyck Printing Co. v. DiNicola*, 648 A.2d 898, 901 (Conn. Super. Ct. 1993) (fact that cove-

more careful in scrutinizing non-compete covenants if they are entered into after the employee has already commenced employment with the employer seeking the covenant.⁸⁰ The rule in most states is that covenants-not-to-compete must be ancillary to an otherwise enforceable contract, or supported by independent consideration.⁸¹ The Eighth Circuit has stated, "As a contract, a covenant not to compete must be supported by consideration to be enforceable Ordinarily, this consideration is furnished by an employee's acceptance of employment from the employer."⁸² When the covenant is not entered into at the time of the employee's acceptance of employment, though, it is not ancillary to the employment contract, and thus, it must be supported by independent consideration.⁸³ Jurisdictions are split on the issue of whether an implied promise of continued employment is adequate and independent consideration.⁸⁴

The rationale behind the requirement of independent consideration in the case of covenants-not-to-compete entered into after the commencement of employment is to prevent employers from using unequal bargaining power to exact the promise from the employee.

[T]he development of the jaundiced judicial view toward restrictive covenants was precisely to counter the unfairness of an employer utilizing its "unequal bargaining power" to exact promises from its employee after the employment relationship had commenced

"[w]hen the employer fails to inform prospective employees of non-competitive agreements until after they have accepted jobs, the employer 'takes undue advantage of the inequality between the parties.'"⁸⁵

In addition, the length of time after which a covenant-not-to-compete is considered not to be ancillary to the employment contract can be consid-

nant-not-to-compete was signed after employment had already commenced did not make it unenforceable on consideration grounds because a final contract had not been completed).

80. See *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279, 285 (4th Cir. 1974).

81. See, e.g., *Creative Entertainment*, 638 N.E.2d at 219; *Gagliardi Bros. v. Caputo*, 538 F. Supp. 525, 527 (E.D. Pa. 1982); see also Mark B. Wessman, *Retaining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713, 795 (1996) (providing a more complete discussion of cases that have required independent consideration in order to enforce non-compete covenants entered into after the commencement of employment).

82. *Modern Controls, Inc. v. Andreadakis*, 578 F.2d 1264, 1267 n.5 (8th Cir. 1978) (citations omitted).

83. See *id.* at 1267.

84. See *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626, 630 (Minn. 1983) ("The mere continuation of employment can be used to uphold coercive agreements, but the covenant must be bargained for and provide the employee with real advantages."); *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 164 (Minn. Ct. App. 1993) (promises of continued employment are not independent consideration); *Ruffing*, 600 A.2d at 548 (employee must receive a benefit or change in status to constitute independent consideration); but see *Mattison v. Johnston*, 730 P.2d 286, 289 (Ariz. Ct. App. 1986) (implied promise of continued employment is adequate consideration to support covenant-not-to-compete entered into after the inception of employment).

85. *College Craft Cos. v. Perry*, Civ. No. 3-95-583, 1995 WL 783612, at *10 (D. Minn. Aug. 9, 1995) (citations omitted).

erably short, sometimes only a matter of days.⁸⁶

If the same rationale were applied to arbitration agreements entered into after the commencement of employment, courts could scrutinize such agreements for independent consideration. Unless the employer is in a jurisdiction that views continued employment as adequate consideration, an arbitration clause in an employee handbook would likely be unenforceable for lack of consideration. Because most handbook modifications are presented to the employee unilaterally on a take-it-or-leave-it basis, employees should not be bound by the modification unless the employer provides valuable consideration in conjunction with the handbook modification. If courts enforce arbitration agreements on the same footing as other contracts, and under general principles of contract law,⁸⁷ they should carefully scrutinize for independent and adequate consideration in handbook modifications that are made after the employee commences work with the employer. Both covenants-not-to-compete and arbitration agreements force employees to give up significant rights, and as such, employers must also give something of real value in exchange for those rights.

B. COMPELLING EMPLOYEES TO SIGN MANDATORY ARBITRATION AGREEMENTS

Because mutual assent to a term of employment may not be required in an at-will employment relationship,⁸⁸ an employer may be able to condition continued employment on the signing of an arbitration agreement. On several occasions, courts have enforced such compelled agreements, even in the face of attacks that the agreements are contracts of adhesion or lack consideration.

For example, in *Hampton v. ITT Corp.*,⁸⁹ the plaintiffs were required to sign employment contracts that contained arbitration agreements reading "ITT CFC and EMPLOYEE agree that any dispute between them or claim by either against the other or any agent or affiliate of the other shall be resolved by binding arbitration"⁹⁰ The plaintiffs argued that the employment agreements were not the result of arms-length bargaining, but the court rejected these arguments, holding that arbitration agreements may be enforced despite arms-length bargaining.⁹¹ At least one court, however, has found a mandatory arbitration agreement to be an unenforceable adhesion contract when it was given to employers on a

86. See, e.g., *id.* (concluding that a non-compete covenant signed six days after employment commenced was considered not ancillary to the employment contract); *Modern Controls*, 578 F.2d at 1269 (finding covenant-not-to-compete proposed to the employee at the commencement of employment, but not signed until nine weeks later was not ancillary to the employment contract unless supported by independent consideration).

87. See *supra* notes 17 and 44 and accompanying text.

88. See *Carlson*, 455 N.W.2d at 339.

89. 829 F. Supp. 202 (S.D. Tex. 1993).

90. *Id.* at 203.

91. See *id.* at 204.

take-it-or-leave-it basis, the arbitrator was associated enough with the employer to be deemed biased, and the other rules were extremely favorable to the employer.⁹²

Depending on how the employer structures the agreement, many courts will not even consider the issues of whether an arbitration is a contract of adhesion or was induced unfairly. If the attack is on the contract as a whole, rather than an attack on the arbitration provision separately, courts will find such attacks subject to arbitration themselves.⁹³ For this reason, employers who wish to avoid a courtroom might want to structure the agreement so that it is an employment agreement that contains more than the arbitration provision. Therefore, any attack on the manner in which the employee's signature was procured will be sent to arbitration itself.⁹⁴

In other cases where employee signatures on arbitration agreements were compelled, the agreements have been upheld despite attacks that the agreements lacked consideration. For example, in *Ryoti v. Paine, Webber, Jackson & Curtis, Inc.*,⁹⁵ the plaintiff was required as a condition of employment to sign an arbitration agreement that was part of his registration with the New York Stock Exchange. He argued that because the agreement was not signed until two weeks after his employment commenced with the defendant, the agreement was void for failure of consideration. The court found no failure of consideration because the plaintiff knew when he accepted the job that he would need to satisfy the requirements to become registered with the New York Stock Exchange.⁹⁶ The plaintiff's job was conditioned on becoming registered with the New York Stock exchange, and in order to become registered with the exchange, persons must sign a standard arbitration agreement.

Just as with arbitration clauses found in employee handbooks, however, signed arbitration agreements might be better analyzed under the same standards as covenants-not-to-compete.⁹⁷ In order to maximize the

92. See *Hope v. Superior Court*, 175 Cal. Rptr. 851, 852-53 (Cal. Ct. App. 1981), *cert. denied*, 456 U.S. 910 (1982).

93. See *Weston v. ITT-CFC*, 8 IER Cases 503 (N.D. Tex. Dec. 3, 1992) (Plaintiffs argued that the arbitration agreement was an adhesion contract because signing the agreement was made a condition of further promotion and pay raises); *Hampton*, 829 F. Supp. at 204. See generally *BALES*, *supra* note 11, at 55 (discussing the "severability doctrine," whereby courts may adjudicate attacks on the making of an arbitration provision, but not on the contract as a whole).

94. Other commentators may argue, however, that employers should structure the arbitration agreement as a stand-alone agreement with no mention that the agreement is an employment agreement in order to avoid the possibility that a court would not enforce the agreement under the Federal Arbitration Act § 1 exclusion of employment contracts. See *Barreca & Levine*, *supra* note 21, at 26. Given that the majority of courts have limited the section 1 exclusion to "workers employed in the transportation industries or engaged in the actual movement of goods in interstate commerce," such a concern may be unwarranted. See *supra* text accompanying notes 20-41 for a discussion of the interpretations of the Federal Arbitration Act section 1 exclusion.

95. 371 N.W.2d 454, 455-56 (Mich. Ct. App. 1985).

96. See *id.* at 457.

97. See *supra* text accompanying notes 78-87.

possibility that the agreements will be enforced, employers will want to ensure that there is adequate and independent consideration for employees to sign the agreements. Whether continued employment is adequate consideration will depend on the jurisdiction and on whether the employment is at-will.⁹⁸ Unlike the handbook provision, however, courts might find that the mutual promises to arbitrate may constitute adequate consideration, especially if the agreement recites the consideration as such.⁹⁹ Many commentators, however, suggest offering some economic benefit as consideration for the arbitration promise with existing employees.¹⁰⁰

C. PROVIDING INCENTIVE FOR EMPLOYEES TO SIGN MANDATORY ARBITRATION AGREEMENTS

Providing an incentive, economic or otherwise to sign an agreement to arbitrate has been one of the less problematic methods of enforcing arbitration agreements with existing employees. Nevertheless, an employer must be careful to ensure that the employee knows that the benefit is given in exchange for the promise to arbitrate.

Some courts have held that employees must be aware of the agreement in order to be bound by it.¹⁰¹ Thus, employers will want to take steps to eliminate the possibility that an employee can later claim he was unaware of the arbitration agreement, such as verbally explaining the agreement before the employee signs it or providing a written summary or outline of the policy.¹⁰² Other courts have found fraudulent inducement where employees believed they were signing an agreement to receive a benefit instead of signing an *arbitration* agreement in exchange for the benefit. For example, in *EZ Pawn Corp. v. Gonzalez*,¹⁰³ the plaintiff claimed he was told to sign an agreement to enable him to begin receiving a stock option and to continue employment with the company. The appellate court found sufficient evidence of fraudulent inducement by the manner in which the agreement was presented to the employee.¹⁰⁴ The Texas Supreme Court later ordered the arbitration anyway,¹⁰⁵ but the case is

98. See *supra* text accompanying note 84.

99. See Barreca & Levine, *supra* note 21, at 31 (citing *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1550 (11th Cir. 1985)); *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984); *Hellenic Lines, Ltd. v. Louis Dreyfus Corp.*, 372 F.2d 753, 758 (2d Cir. 1967).

100. See, e.g., Barreca & Levine, *supra* note 21, at 31.

101. See *Prudential*, 42 F.3d at 1304; *Reese v. Commercial Credit Corp.*, 955 F. Supp. 567, 570 (D.S.C. 1997).

102. For example, in *Kelly v. UHC Management Co., Inc.*, 967 F. Supp. 1240 (N.D. Ala. 1997), the employer was extremely cautious in its implementation of an arbitration policy. Although the employer did not have the employees sign a stand-alone arbitration policy, it included the policy in the employee handbook, had employees sign an acknowledgment form, wrote a letter to employees explaining the policy, sent memoranda to employees explaining the policy, trained both employees and managers regarding the arbitration policy, and sent a "broadcast e-mail" to all employees further explaining the policy. See *id.* at 1244-45.

103. 921 S.W.2d 320 (Tex. App.—Corpus Christi 1996, writ denied).

104. See *id.* at 324-25.

105. See *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87 (Tex. 1996) (orig. proceeding).

useful to illustrate the manner in which some judges might view arbitration agreements as fraudulently induced if the employer is not careful in the implementation of the agreements.

Contrary to *EZ Pawn*, however, is *Vukasin v. D.A. Davidson & Co.*¹⁰⁶ Ms. Vukasin sued her employer when another employee assaulted her at work. The employer, however, insisted that the matter be resolved in arbitration because the plaintiff had signed an annual performance review that contained an arbitration clause. Along with the review, she received a bonus of \$399.99. In her affidavit, Ms. Vukasin claimed that she was told the bonus was given to her because the company had a good year, not in exchange for the arbitration agreement. In addition, other employees also testified that they were told that the bonuses were given because of the company's good year and not in exchange for their promise to arbitrate. The court would not consider her claim of fraud in the inducement of the agreement, though, because it found the claim went to the making of the agreement as a whole, and was thus, arbitrable.¹⁰⁷ Because Ms. Vukasin claimed to have no knowledge that the bonus was given in exchange for her promise to arbitrate, she also asserted that there was no consideration for her signature to the arbitration agreement. The court disagreed, however, finding that when the arbitration provision is contained in a "larger unitary contract," the consideration only need go to the contract as a whole, and not to the individual agreement to arbitrate within.¹⁰⁸

Additionally, for non-legal reasons, employers may wish to provide some sort of economic incentive for employees to sign an arbitration agreement. The circumstances surrounding the arbitration agreement of Alston & Bird illustrate why employee morale may decrease when employees are forced to sign an arbitration agreement without any incentive or input in the matter. Alston & Bird, a large Atlanta law firm, decided to require all partners, associates, paralegals, and secretaries to sign an arbitration agreement as a condition of employment.¹⁰⁹ The agreement caused so much controversy that the firm subsequently modified its terms, yet many still refused to sign it and began looking for other jobs.¹¹⁰ Providing some form of economic incentive for employees to sign an arbitration agreement is more likely to produce favorable results while improving employee morale by encouraging them to view the agreement as a positive step toward improved employer-employee relations, rather than yet another burden imposed on them by the employer.

106. 785 P.2d 713 (Mont. 1990).

107. See *id.* at 717.

108. See *id.*

109. See Mark Curriden, *Sign It, Alston & Bird Staff Told: Presented With an Employment Contract, Firm's Employees Show Lawyerly Caution*, 80 A.B.A. J. 25 (1994).

110. See *id.*

IV. GOVERNMENT REACTION

The topic of mandatory arbitration has sparked so much controversy that many legislators, as well as government and non-government organizations, have taken a stand on the issue. Bills have been introduced into Congress and some state legislatures that would prohibit or significantly limit mandatory arbitration agreements between employers and employees, and organizations such as the Equal Employment Opportunity Commission, the National Labor Relations Board, and various lawyers' and arbitral organizations have voiced opposition to mandatory employment arbitration agreements. Pressure from Congress, civil rights advocates, and attorneys' groups recently led the National Association of Securities Dealers to vote to eliminate its long-standing policy of implementing mandatory arbitration agreements with registered brokers.¹¹¹ Despite this fairly strong opposition to mandatory arbitration, much of the proposed reform has fallen by the wayside. However, should the dissatisfaction with recent court decisions continue to grow, proposed reform and its proponents may become more significant in the upcoming years.

A. PROPOSED LEGISLATIVE REFORM

In March of 1997, Representative Edward Markey, a Democrat from Massachusetts, introduced H.R. 983, the Civil Rights Procedures Protection Act of 1997, into Congress. The Bill would amend eight federal statutes, often used by employees in claims against employers to provide that the "powers and procedures" specified in each statute would be exclusive "unless after such right or claim arises the claimant voluntarily enters into an agreement to resolve such right or such claim through arbitration or another procedure."¹¹² The statutes amended would include Title VII of the Civil Rights Act of 1964,¹¹³ the Age Discrimination in Employment Act of 1967,¹¹⁴ the Rehabilitation Act of 1973,¹¹⁵ the Americans With Disabilities Act of 1990,¹¹⁶ Section 1977 of the Revised Statutes of the United States,¹¹⁷ the equal pay requirement under the Fair Labor Standards Act of 1938,¹¹⁸ the Family and Medical Leave Act of 1993,¹¹⁹ and

111. See *Arbitration Elimination of Mandatory Arbitration*, *supra* note 15.

112. H.R. 983, 105th Cong. §§ 2-10 (1997).

113. 42 U.S.C. §§ 2000e-2000h-6 (1994); see H.R. 983, 105th Cong. § 2 (1997) (for proposed amendment).

114. 29 U.S.C. §§ 621-634 (1994); see H.R. 983, 105th Cong. § 3 (1997) (for proposed amendment).

115. 29 U.S.C. § 795 (1994); see H.R. 983, 105th Cong. § 4 (1997) (for proposed amendment).

116. 42 U.S.C. § 12117 (1994); see H.R. 983, 105th Cong. § 5 (1997) (for proposed amendment).

117. 42 U.S.C. § 1981 (1994); see H.R. 983, 105th Cong. § 6 (1997) (for proposed amendment).

118. 29 U.S.C. § 206(d) (1994); see H.R. 983, 105th Cong. § 7 (1997) (for proposed amendment).

119. 29 U.S.C. § 2651 (Supp. 1995); see H.R. 983, 105th Cong. § 8 (1997) (for proposed amendment).

the Federal Arbitration Act.¹²⁰ Senator Russell Feingold (D-Wis.) introduced a similar bill in the Senate.¹²¹

The purpose of the proposed legislation, according to Rep. Schroeder, is to prevent "employers in all industries from forcing employees to give up their right to go to court . . ." ¹²² Rep. Markey urged members of the House to support the Bill because "[n]o employer should be permitted to ask workers to check their constitutional and civil rights at the front door."¹²³

H.R. 983, which was referred to both the House Committee on Education and the Workforce and the House Judiciary Committee, had forty-seven co-sponsors—mostly Democrats—as of September 1997.¹²⁴ In September of 1996, the previously introduced bill had only ten co-sponsors.¹²⁵ The increase in support for the legislation may be due in part to courts' increased willingness to uphold arbitration agreements unilaterally imposed on employees by their employers.

Similar bills were introduced in the House and Senate by Rep. Markey and Sen. Feingold, as well as Rep. Marjorie Margolies-Mezvinsky (D-Pa.) and Rep. Patricia Schroeder (D-Colo.) in 1994, 1995, and 1996.¹²⁶ In 1994, Rep. Markey told members of Congress that the practice of requiring employees to sign mandatory arbitration agreements "flies in the face of the spirit of the anti-discrimination laws passed by Congress and on the books of states and municipalities across the country." Each of the previous bills has met with no success in Congress, however, with most never voted out of committee.¹²⁷

Some states have considered legislation that would prohibit mandatory employment arbitration agreements.¹²⁸ For example, California Sen. Nicholas Petris introduced Senate Bill 1012, which would prohibit agreements to arbitrate claims under the California Fair Employment and Housing Act prior to the existence of such claims.¹²⁹ The Bill would have made it an unlawful employment practice (similar to discrimination on the basis of race, age, or gender) for

120. 9 U.S.C. § 14 (1994); *see* H.R. 983, 105th Cong. § 9 (1997)(for proposed amendment).

121. *See* S. 63, 105th Cong. (1997).

122. 143 CONG. REC. E407 (daily ed. March 6, 1997) (statement of Rep. Markey).

123. *Id.*

124. *See* 1997 Bill Tracking H.R. 983, *available in* LEXIS, BLTRCK file.

125. *See* 1996 Bill Tracking H.R. 3748, *available in* LEXIS, BLTRCK file.

126. *See* Protection from Coercive Employment Agreements Act, S. 2012, 103d Cong. (1994); Civil Rights Procedures Protection Act of 1994, S. 2405, 103d Cong. (1994); Civil Rights Procedures Protection Act of 1994, S. 366, 104th Cong. (1995); and H.R. 3748, 104th Cong. (1996).

127. *See* 1995 Bill Tracking S. 366, *available in* LEXIS, BLTRCK file.

128. It is possible that state legislation might not be upheld on federalism grounds if it is found to conflict with the FAA. *See* BALES, *supra* note 11, at 56, for a discussion of federal preemption of state legislation.

129. *See* S. 1012, Leg. Reg. Sess. (Cal. 1995); *see also* John True, *The Future of Employment ADR; New Rules for New Challenges* (visited Jan. 16, 1997) <<http://www.adr.org.employmentadrfuture.html>>.

an employer to require a current or potential employee, as a condition of employment, to submit any employment related claim to arbitration, to request a current or potential employee to agree to arbitrate any claims prior to the existence of an actual dispute, or to discriminate against any person who has opposed forbidden employment practices, as specified.¹³⁰

The Bill was sent to the California Senate Committee on the Judiciary, but was not heard and was sent back to the Secretary of the Senate.¹³¹

Furthermore, some judges and commentators have looked to the congressional history of other legislation to find that Congress did not intend mandatory employment arbitration agreements to be enforceable. For example, then-Senator Dole's statement during the debate regarding the Civil Rights Act of 1991, that arbitration agreements "where the parties knowingly and voluntarily elect to use these methods" should be enforced, has been cited as authority for the proposition that mandatory arbitration agreements should not be enforced when employees do not consent or know they are giving up certain rights.¹³²

In addition, other commentators have suggested that Congress intended for the 1991 amendments to the Civil Rights Act to encourage arbitration as an additional remedy that would co-exist with traditional litigation, rather than preclude arbitration.¹³³ An example of legislative history that would support this proposition is the report of the House Committee on Education and Labor, which stated in part that

[T]he use of alternative dispute resolution mechanisms is intended to supplement, not supplant the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.¹³⁴

Some courts have also been reluctant to enforce mandatory arbitration agreements in the claims arising out of the Americans with Disabilities Act.¹³⁵ In *Riley v. Weyerhaeuser Paper Co.*, the court refused to enforce the mandatory arbitration provision of a collective bargaining agreement, finding Congressional intent to preclude waiver of judicial remedies in the legislative history of the Act.¹³⁶ "While the text of the [ADA] statute

130. S. 1012, Leg. Reg. Sess. (Cal. 1995).

131. See 1995 Calif. Bill Tracking S. 1012, available in Westlaw, CA-BILLS file.

132. See True, *supra* note 129 (citing *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994) and 137 Cong. Rec. S15,478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole)).

133. See, e.g., Levy, *supra* note 67, at 468.

134. *Id.* (citing H.R. REP. NO. 40(I), at 97 (1991), reprinted in 1991 U.S.C.C.A.N. 635).

135. See Levy, *supra* note 67, at 469; see also *Collective Bargaining Arbitration Clause No Bar to ADA Suit*, 50 JAN. DISP. RESOL. J. 88 (1995) (discussing other cases in which judges have been reluctant to enforce arbitration agreements for claims arising under the Americans with Disabilities Act).

136. See *Riley v. Weyerhaeuser Paper Co.*, 898 F. Supp. 324, 326-27 (W.D.N.C. 1995) (citations omitted). See also Levy, *supra* note 67, at 469-471 (discussing courts' treatment of the ADA and mandatory arbitration).

in [42 U.S.C.] § 12112 does encourage the use of alternative means of dispute resolution where appropriate, including arbitration, the legislative history of the Act is unequivocal in expressing Congress's intent to preclude a waiver of judicial remedies[.]”¹³⁷

B. AGENCY RESPONSE

At least two federal agencies have voiced opposition to the use of mandatory arbitration agreements in employment relationships.¹³⁸ Both the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB) have taken action in an attempt to ensure that employers do not deprive employees of their procedural rights to use the agency process to contest an illegal employment practice.¹³⁹

The EEOC issued a policy statement in 1995 opposing the use of mandatory arbitration agreements as a condition of employment.¹⁴⁰ The EEOC reiterated its support for voluntary programs for alternative dispute resolution, but called mandatory agreements “unfair,”¹⁴¹ identifying “voluntariness” as one of the components of fairness.¹⁴² The EEOC's policy on voluntariness states:

ADR programs developed by the Commission will be voluntary for the parties because of the unique importance of the laws against employment discrimination requires that a federal forum always be available to an aggrieved individual. The Commission believes that parties must knowingly, willingly and voluntarily enter into an ADR proceeding. Likewise, the parties have the right to voluntarily opt out of a proceeding at any point prior to resolution for any reason, including . . . to file a lawsuit in federal district court. In no circumstances will a party be coerced into accepting the other party's offer to resolve a dispute.¹⁴³

The Commission further emphasized its stand on the issue by seeking an injunction against the River Oaks Imaging and Diagnostics Company, which required an arbitration agreement as a condition of

137. *Riley*, 898 F. Supp. at 326-27 (citations omitted).

138. See Richard C. Reuben, *Two Agencies Review Forced Arbitration; EEOC Gets Injunction Against Company That Told Workers: Accept SDR or Quit*, 81 A.B.A. J. 26 (1995); Andrew W. Volin, *Employment Law ADR Update 1996: News for Colorado Employers*, 25 JUN. COLO. LAW. 39 (1996).

139. See Volin, *supra* note 138, at 140. For a discussion of cases not cited below in which the EEOC and NLRB have taken a stand against mandatory employment arbitration agreements, see Levy, *supra* note 67, at 477-79; Lewton, *supra* note 4, at 1026-28. It is unclear, however, whether agencies such as the NLRB and EEOC have the authority to prohibit mandatory arbitration. See, e.g., Bales, *supra* note 11, at 84-88 (arguing the EEOC has no authority to interpret the FAA).

140. See David E. Rovella, *EEOC Says No to Forced Arbitration*, NAT'L L.J., June 5, 1995, at B1; EEOC: ALTERNATIVE DISPUTE RESOLUTION POLICY, July 17, 1995 (on file with SMU Law Review).

141. Reuben, *supra* note 138; Rovella, *supra* note 140.

142. See EEOC: ALTERNATIVE DISPUTE RESOLUTION POLICY, *supra* note 140.

143. *Id.* at 7302.

employment.¹⁴⁴

The River Oaks policy stated that refusal to sign the agreement would "be deemed a voluntary termination initiated by the employee."¹⁴⁵ The policy was instituted after several employees had filed sexual harassment complaints against the company.¹⁴⁶ Two employees were terminated for refusing to sign the arbitration agreement until they had consulted a lawyer, despite the fact that the cover letter attached to the agreement suggested that employees consult a lawyer before signing the agreement.¹⁴⁷ The EEOC subsequently filed suit against the company. The court issued a preliminary injunction against River Oaks, stating that the policy was "so misleading and against the principles of Title VII of the Civil Rights Act of 1964 that its use violates such law."¹⁴⁸ The case ultimately settled.¹⁴⁹

The National Labor Relations Board brought suit against two employers in Florida for their allegedly unfair employee arbitration agreements.¹⁵⁰ The first, against Bentley's Luggage Corporation, involved an employee who was fired from his part-time sales job with Bentley's for refusing to sign an arbitration agreement that the company asked its employees to sign.¹⁵¹ Bentley's settled with the NLRB, returning the employee to his job and awarding him back pay of \$13,728.¹⁵² In addition, Bentley's amended employment agreement now informs employees that they have access to federal agencies.¹⁵³

A second case in which the NLRB has participated involved Great Western Financial Corporation.¹⁵⁴ A terminated Great Western customer service representative filed a complaint with the NLRB after she was allegedly terminated for talking with other employees about company problems. Great Western subsequently sued her, claiming that she was bound by her arbitration agreement to settle the case through arbitration rather than attempting to resolve it through the agency process.¹⁵⁵ While the case was still pending decision in federal court, the NLRB asked Great Western not to require its employees to sign mandatory arbi-

144. See *E.E.O.C. v. River Oaks Imaging and Diagnostic*, 67 Fair Empl. Prac. Cas. (BNA 1243) (S.D. Tex. April 19, 1995).

145. Reuben, *supra* note 138.

146. See L.M. Sixel, *Forced Arbitration Re-Examined Amid Employee Rights Concerns*, COM. APPEAL (Memphis, TN), Feb. 4, 1996, at C3.

147. See Lewton, *supra* note 4, at 1027-28. The company, however, characterized their action as "quitting." *Id.* at 1027.

148. *River Oaks*, 67 Fair Empl. Prac. Cas. (BNA) at 1243.

149. See Sixel, *supra* note 146.

150. See Bentley's Luggage Corp., NLRB Case No. 12-CA-16658, 1995 Daily Lab. Rep. (BNA) D-4 (Sept. 25, 1995); Lara Wozniak, *Out-of-Court Settlements Face Challenge in Court Series*, ST. PETERSBURG TIMES, Sept. 16, 1996, at 12.

151. See Wozniak, *supra* note 150.

152. See *id.*

153. See *id.*

154. See Great Western Financial Corp., NLRB Case No. 12-CA-166866, 1995 Daily Lab. Rep. (BNA) D-4 (Sept. 25, 1995).

155. See Wozniak, *supra* note 150.

tration agreements,¹⁵⁶ illustrating the agency's concern with preemption by mandatory arbitration.

Private lawyers' organizations have joined the debate as well. A group of plaintiffs' employment lawyers in California threatened a boycott of a provider of alternative dispute resolution services if it continued to accept disputes brought under mandatory arbitration provisions.¹⁵⁷ The American Bar Association Section of Labor and Employment Law, by contrast, has been unable to come to an agreement on whether mandatory arbitration agreements are proper.¹⁵⁸ The organization endorsed *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship* without ever reaching a consensus on the issue.¹⁵⁹ The Protocol, which was also endorsed by the American Arbitration Association,¹⁶⁰ was developed by the Dunlop Commission, a multi-partisan task force composed of persons from management, employment, and government.¹⁶¹ Because the Dunlop Commission could not reach a consensus on the issue, it listed four differing views on the subject of mandatory arbitration including:

[1.] Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but any agreement to mediate and/or arbitrate disputes should be informed, voluntary, and not a condition of initial or continued employment.

[2.] Employers should have the right to insist on an agreement to mediate and/or arbitrate statutory disputes as a condition of . . . employment. Postponing such an agreement until a dispute actually arises, when there will likely exist a stronger predisposition to litigate, will result in very few agreements to mediate and/or arbitrate, thus negating the likelihood of effectively utilizing alternative dispute resolution and overcoming the problems of administrative and judicial delays which now plague the system.

[3.] Employees should not be permitted to waive their right to judicial relief of statutory claims arising out of the employment relationship for any reason.

156. *See id.*

157. *See* Volin, *supra* note 138, at 40.

158. *See id.*

159. *See id.*

160. *See* AMERICAN ARBITRATION ASSOCIATION, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES; ARBITRATION AND MEDIATION RULES, *supra* note 6, at 3.

161. *See* Michael J. Molony, Jr., *A-Mazing! A Due Process Protocol for Mediation and Arbitration of Employment Law Disputes*, 44 LA. B.J. 126, 126 n.1 (1996).

The Dunlop Commission (named for Professor Dunlop of Harvard University who served on the commission) was created by the United States Secretaries of Labor and Commerce in 1993 to study labor and employment issues and to make recommendations about matters particularly concerned with the employer-employee relationship. One section of the report dealt with employment litigation and dispute resolution issues.

Id. at 126 n.1. Members of the Commission represented organizations such as the American Bar Association, the National Academy of Arbitrators, the Society of Professionals in Dispute Resolution, the Federal Mediation and Conciliation Service, the National Employment Lawyers Association, and the American Civil Liberties Union. *See id.* at 127 n.2.

[4.] Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but the decision to mediate and/or arbitrate individual cases should not be made until after the dispute arises.¹⁶²

The Commission refused to take a position on the timing of arbitration agreements, but did agree that such agreements should be "knowingly made."¹⁶³

V. POLICY ARGUMENTS BEHIND THE ENFORCEMENT/ NON-ENFORCEMENT OF MANDATORY ARBITRATION AGREEMENTS BETWEEN EMPLOYERS AND EMPLOYEES

A. PRO-ENFORCEMENT ARGUMENTS

Proponents of the enforcement of mandatory arbitration agreements between employers and employees cite the legislative history of the Federal Arbitration Act and the Supreme Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.* as authority for enforcing such agreements. The stated purpose of the Federal Arbitration Act was to "place arbitration agreements on the same footing as other contracts."¹⁶⁴ Although opponents of the enforcement of mandatory arbitration agreements state that such agreements would not be enforceable contracts because of the adhesive nature of the agreement and unequal bargaining power between the parties, *Gilmer* held that "[m]ere inequality in bargaining power [between employers and employees] is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."¹⁶⁵

Other courts have held that arbitration agreements are not unenforceable adhesion contracts because the agreements, in general, do not favor employers.¹⁶⁶ The terms of arbitration are equally favorable to each side because both sides are mutually agreeing to give up a right to a jury trial.¹⁶⁷ In addition, proponents cite the courts' willingness to resolve any doubts relating to the arbitrability of an issue in favor of arbitration.¹⁶⁸ These proponents argue that the courts' favoritism reflects public policy in support of arbitration.

B. ANTI-ENFORCEMENT ARGUMENTS

Other commentators have been unequivocal in their disdain for mandatory arbitration agreements between employers and employees.

162. *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship* 1-2, May 9, 1995 (on file with SMU Law Review).

163. *Id.* at 2.

164. *Gilmer*, 500 U.S. at 24.

165. *Id.* at 33.

166. *See Golenia*, 915 F. Supp. at 204.

167. *See id.*

168. *See Rojas*, 87 F.3d at 748.

One judge characterized arbitration clauses in employment agreements, "or worse yet, [on] the back sides of employment applications," as the result of unequal bargaining power.¹⁶⁹ Even harsher are those who believe that employees are forced to "[sign] away their right not to be discriminated against."¹⁷⁰ They argue that the public policy of protecting the victims of sexual discrimination and harassment is at least as strong as the public policy in favor of arbitration.¹⁷¹

Another argument is that procedural protection and remedies can differ significantly in arbitration, and plaintiffs should only be forced to forego those rights if they have knowingly and voluntarily agreed to do so. The Supreme Court has suggested that it would be less willing to enforce arbitration agreements that tried to limit an employee's procedural protection and remedies even further by severely limiting a plaintiff's rights to discovery or damages.¹⁷²

VI. CONCLUSION

Although the trend among courts today has been to enforce most mandatory arbitration agreements between employers and employees, a different policy should be considered when such agreements are not truly voluntary. Arbitration has significant benefits for both employers and employees, but if an employer wishes to take advantage of such benefits, it should fully explain the procedure and benefits to the employee and obtain voluntary consent, in order to allow the employee to make an informed decision.

Enforcing arbitration provisions that are contained in innocuous amendments to employee handbooks or promulgated in poorly understood written policy statements without obtaining the consent and signature of employees is an egregious example of an enforcement decision made on shaky policy ground. Employees are being bound by the terms of an employee handbook when employers are bound by almost nothing in the manual. The purpose behind the enactment of the Federal Arbitration Act was to ensure the enforcement of arbitration agreements on the same ground as other contracts, not on quasi-contractual standards such as those set forth in *Carlson v. Hutzel Corp.*¹⁷³

In addition, finding that employees who remain in their employment after an arbitration policy is announced have consented to the policy ignores the reality of the choices most employees have in employment deci-

169. *Wylie Indep. Sch. Dist. v. TMC Found., Inc.*, 770 S.W.2d 19, 24 (Tex. App.—Dallas 1989, writ dismissed) (Howell, J., dissenting).

170. Roy Furchgott, *Earning It: Workers Who Sign Away a Day in Court*, N.Y. TIMES, July 28, 1996, § 3 at 9.

171. See *Prudential*, 42 F.3d at 1305. Obviously, not all disputes over arbitration arise in the case of sexual discrimination or harassment, but the same argument could be made for a variety of employment disputes.

172. See *Gilmer*, 500 U.S. at 30-33 (discussing limits on discovery, compensatory and punitive damages, challenges to arbitrators, and written opinions).

173. 455 N.W.2d at 338; see also *supra* text accompanying notes 47-51.

sions. The typical worker cannot afford to resign his employment every time an employment policy is changed, especially one that he casually believes may never affect him, and the impact of which on his procedural rights he might not understand at the time. The considerations for existing employees are different than those for a new or prospective employee who may have more flexibility in deciding that he may not wish to commence employment with an employer who already has a mandatory arbitration policy. Such a decision is made at a time when an employee has less to lose than does a current employee who has been building seniority and other benefits with the employer for some time. Unlike current employees, who have become dependent on the steady income they derive from their employer and cannot always afford to resign and look for a new job, prospective employees are already in the job-search process, and can more easily search for a different job with more desirable employment policies.

In addition, analogizing mandatory arbitration provisions added to employment policies to other dissimilar terms of employment that employees must choose to accept or else resign involves somewhat faulty logic. In the past, arbitration clauses have been likened to changes in pay structure, drug testing, and other terms of employment that are relevant to the employee during his or her tenure of employment. Arbitration agreements should instead be likened to covenants-not-to-compete, the enforcement of which likely will not arise, if at all, until after employment has been terminated. Although an employer may have the right to condition continued employment on a new term of employment, the employer should not have the right to bind the employee to a post-termination agreement without independent consideration. Most jurisdictions require independent and adequate consideration before non-compete covenants entered into after the commencement of employment are enforced, and the same should be required to enforce arbitration agreements entered into between employers and their existing employees.

The same rationale applies to the compelled signature of arbitration agreements. Such contracts are often not the result of arms-length bargaining, and although this alone may not be enough to make them unenforceable,¹⁷⁴ the fact that they lack consideration other than the continuation of employment should make such agreements suspect. Just as with the amendments to employee handbooks, the coerced signature of agreements to arbitrate should be analogized to covenants not to compete, and should require independent consideration.

If employers continue unilaterally to impose mandatory arbitration agreements on employees, more cases will be publicized in which employers have instituted mandatory arbitration with biased terms and procedures. Should this scenario occur, the likelihood of Congress passing legislation prohibiting mandatory arbitration agreements altogether will

174. See *Gilmer*, 500 U.S. at 33.

increase, and employers may lose the opportunity to take advantage of the expediency and other merits of a balanced and non-biased alternative dispute resolution process. Employers who wish to arbitrate their disputes with employees should implement such policies fairly, by making the terms and procedures for arbitration balanced, obtaining informed and voluntary assent from the employees, and by providing consideration in exchange for the employee's voluntary promise to arbitrate. Employers can wait to enact arbitration agreements with individual employees until a time when they are already planning to grant them a significant benefit such as a promotion, stock options, or a pay raise.¹⁷⁵

One employer has had tremendous success in obtaining consent to mandatory arbitration provisions by eliminating the at-will nature of the employee's employment in exchange for the consent.¹⁷⁶ Providing even a small benefit will usually eliminate the consideration issues, and may improve employee morale. If the employer finds arbitration to be an attractive alternative to litigation, then the costs of obtaining truly voluntary arbitration agreements with employees should outweigh the cost of their implementation. If not, employers may find that "rather than avoiding litigation altogether, they have simply substituted one kind of litigation for another."¹⁷⁷

175. See Barreca & Levine, *supra* note 21, at 30. See also *Modern Controls*, 578 F.2d at 1267 (suggesting that independent consideration in the case of a covenant not to compete entered into after the commencement of employment might include "a raise, a new position, or an increased employment term").

176. See Barreca & Levine, *supra* note 21, at 30. Eliminating the at-will nature of employment for certain employees may be undesirable, however, for reasons not discussed herein.

177. Lewton, *supra* note 4, at 994.